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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-898

NORVAL GOSS, et al.,
APPELLANTS,

v.

EILEEN LOPEZ, etc., et al.,
APPELLEES.

ON APPEAL FROM A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

APPELLEES' BRIEF ON THE MERITS

Opinion Below

The opinion filed by the District Court has not, as yet, been reported. A copy of the Order and Opinion is reprinted in Appellees' Motion To Affirm as Appendix A.

Statutes Involved

A. Section 3313.66 of the Ohio Revised Code:

> The superintendent of schools of a city or exempt village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of expulsion or suspension notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent or guardian or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may act upon the expulsion only at a public meeting. The board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended beyond the current semester.

B. Section 1010.04 Administrative Guide, Columbus Public Schools:

> 1010.04 — Pupils may be suspended or expelled from school in accordance with the provisions of Section 3313.66 of the Revised Code.

C. The Fourteenth Amendment to the United States Constitution, Section 1, which states, in relevant part:

> —Nor shall any state deprive any person of life, liberty or property without due process of law—

Question Presented

Was the Court below incorrect when it held that the exclusion of Ohio students from school for up to ten (10) days without *any* form of fact-finding hearing was a violation of the Due Process guarantees of the Fourteenth Amendment to the United States Constitution?

Statement of the Case

In the Spring of 1971, during a period of heightened racial consciousness, several schools in the Columbus, Ohio School System were affected by racial confrontation, demonstrations and problems of various sorts. Some school officials responded by issuing blanket suspensions to all identifiable students at a given time or place.[1] Many of these students were innocent victims of these sweeping suspensions,[2] having merely been guilty of being in the wrong place at the wrong time.[3] Since the Ohio Law and the Columbus Regulations failed to provide for any procedural safeguards for these students, they had no

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[1] Although the Appellees (hereinafter students) never were certain of the exact number of children suspended, one indication is given by the testimony of Dwight Lopez, referred to in the Court's Opinion. (Motion To Affirm, p. 20). Lopez testified that he personally knew more than seventy-five students suspended from one school. (Central High School) on one given day. (Appendix, p. 120).

[2] See, e.g., the testimony of the students who testified at the trial. (Appendix, pp. 119-54).

[3] Typical of this syndrome is the testimony of Dwight Lopez and Betty Jane Crome. (Appendix, pp. 119-37).

forum to protest their innocence.[4] The result was resort to the courts in the form of this present action.

The students filed suit alleging that their suspensions violated the Procedural Due Process requirements of the Fourteenth Amendment to the United States Constitution. More specifically it was alleged that 42 U.S.C. 1983 was violated. Nine named Plaintiffs sued on behalf of a class of Columbus school students who had been suspended in a like manner. Section 3313.66 was challenged directly because it was manifest that in the absence of the statute, no authority existed to exclude children from school,[5] that the statute specifically permited suspensions without any hearing and expulsions without any prior hearings, and that in fact, the statute was relied upon by the Columbus school officials.[6] The students sought a declaration of the section's unconstitutionality, an injunction against its enforcement, and expungement of any reference to the suspensions contained in school files.

The Court, after trial, declared Section 3313.66 and Columbus Regulations in effect at the time of the suspensions unconstitutional on the grounds that they failed to provide for a hearing prior to suspension. The Court further ordered expungement as requested. It is this decision which is presently being appealed.

Although this is a class action challenging an institutional practice embodied in a law and a regulation, it is

[4] Some students did have subsequent conferences (usually ten (10) days or more after the termination of schooling) which were held not to elicit the truth but to determine future goals and placement. (Appendix, p. 114).

[5] See, e.g., § 3313.64 of the Ohio Revised Code which mandates a free education for each child between the ages of 6 and 21, and § 3321.01 which prescribes compulsory education.

[6] See, e.g., § 1010.04 of the Administrative Guide to the Columbus Public Schools set out in the "Statutes Involved" Section of this Brief.

thought useful to outline briefly the facts surrounding the suspensions of the named Plaintiffs who testified.[7] These facts are offered in order to provide the Court with a better picture of how the law operates. A summary of the facts surrounding the suspensions of four of the named Plaintiffs demonstrates the arbitrariness which the statutes and regulations sanction.

Dwight Lopez testified that on February 26, 1971 he was sitting in the school lunch room at Central High School when some other students entered and started overturning tables.[8] Apparently he was mistaken for a participant, for that afternoon he received a phone call from the school principal informing him that he was suspended and should not return to classes. A letter was also sent that day informing Dwight's parents that Dwight was suspended, that they should keep him home, and that a "conference" would be arranged (at an unspecified time) to determine "what the problems may be." Another letter was mailed

[7] Four of the original nine representative Plaintiffs testified. It was not felt necessary to present the testimony of all since this case involves an unquestioned practice of suspending students for up to ten (10) days without any hearing; once that was established the major issue of Constitutional propriety was raised; it should also be noted that some of the Plaintiffs had disappeared during the two and one half years between the filing of the Complaint and the trial. Finally, a statement contained in Appellants' Brief should be clarified. On page 3 of Appellants' Brief on The Merits it is asserted that four of the nine were above the age of compulsory attendance. It is true that four were above the age of eighteen, the age set for mandatory attendance. (ORS 3321.01). However, all were below the age of twenty-one. Under Ohio Law (ORS 3313.64) children under the age of twenty-one are entitled to a free public education.

[8] Dwight's testimony from which this summary is extracted is found in the Appendix at pp. 119-31. The letters referred to are Plaintiffs' Exhibits 1A through 1D and appear in the Appendix at pp. 120-25 and 190-93. The exhibits of the Plaintiffs and Defendants contained at pages 191-286 were admitted into evidence by oral stipulation at the beginning of the trial. The Transcript, however, does not record this stipulation. Thus the point at which some exhibits were formally introduced into evidence is not recorded.

on March 1, similar to the first, which directed that Dwight should remain at home and that a conference would, at some unspecified time, be arranged. On March 5 a letter was mailed to the parents informing them that a conference was set for March 8. On March 8 there were demonstrations outside the building scheduled for the "conference" which prevented its being held. Dwight testified that despite attempts by his sister to set another conference, none was ever held. By letter dated March 24, the District informed Dwight that he was to be transferred to "Adult Day School," although he had not requested this.

Dwight was out of school almost one month before receiving permission to return. Dwight testified that he lost credit, was treated as a trouble maker at his new school and was unable to make up his courses as a result of the suspension and transfer.[9] None of his testimony, including his assertion of innocence of any wrongdoing, was ever refuted. No hearing at any time was ever offered or held.

Betty Jane Crome was attending McGuffey Junior High School on March 3, 1971.[10] During the morning of that day, the principal decided to close the school due to disturbances. Betty had nothing to do with the disturbances. On her way home Betty had to pass Linden McKinley Senior High School. Demonstrations were taking place, and Betty stopped to watch. While there, the police swept in and picked up all students who were in the vicinity. Betty was among them. After taking her to the Police Station, the police called Betty's home and told her guardian to pick her up. No charges were ever filed. At the suggestion of the police, the guardian telephoned the

[9] Appendix, pp. 122-26.

[10] The testimony of Betty Jane from which this statement derives is found at pp. 131-37 of the Appendix. The letter referred to is Plaintiffs' Exhibit 2A and is located at pp. 131 and 202 of the Appendix.

school to find out if Betty was suspended. The guardian was told that she was, and a letter confirming that fact was received. The letter indicated that Betty was suspended until March 8 when a "conference" would be held. On March 8 Betty returned to school. This testimony was unrefuted. No hearing to determine the merits of the suspension was ever offered or held. It is worth noting that Betty's "activities" were unrelated to the school she was attending and could not even arguably have prompted an "emergency" suspension.

Deborah Fox was attending Marion-Franklin High School on March 10, 1971.[11] On that day, during the course of some demonstrations, Deborah was suspended from school for a ten (10) day period (until March 19). A letter confirming the suspension was mailed on the same day. No hearing or conference was ever offered or held. On March 19 when Deborah attempted to return to school she was informed that she was suspended for another ten (10) day period. A letter confirming this fact was mailed that same day.[12] Finally by letter of March 23, Deborah was informed that she was to be transferred to South High School. No hearing or conference either preceded or followed either the second suspension or the transfer. Deborah testified that she received zeros for work missed, and that

[11] The Statement of Facts concerning Deborah Fox is abbreviated because there is testimony by the school principal which controverts that of Deborah. Nevertheless the central fact remains: the student maintains that she engaged in no wrongdoing, but was afforded no opportunity to establish her contention. For Deborah's testimony, see pp. 147-54 of the Appendix. Refutation is provided by the school principal. See p. 102 *et seq.* of the Appendix. Letters referred to are Plaintiffs' Exhibits 3A, 3B and 3C found at pp. 151 and 211 *et seq.* of the Appendix.

[12] Deborah testified that she did nothing on March 19, but merely was told upon her return that her suspension was to continue. The principal maintained that she had been "disruptive." The letter is unusually silent about the reason for the second suspension. (Plaintiffs' Exhibit 3B, Appendix, pp. 151 and 212).

she had difficulty adjusting to her classes upon her return. (Appendix, pp. 152-53). She also had a permanent notation inserted in her file concerning the suspension. (Appendix, p. 219).

Susan Cooper was suspended from Marion-Franklin High School on March 15, 1971 for a period of ten (10) days.[13] Demonstrations had taken place and Susan was alleged to have been involved. A letter confirming the suspension was mailed to Susan's mother on March 16, setting up a "conference" for March 25, the day scheduled for Susan's return. Susan was out of school for ten (10) days. No hearings or conference designed to elicit the truth was held at any time—either before or after the suspension. Susan testified that she fell behind in her school work, receiving zeros for work missed and was given no opportunity to make up the work. (Appendix, pp. 143 and 147).

The treatment accorded these students is typical with regard to hearings.[14] No hearing or conference designed to elicit the truth of the charges supporting a suspension is given to a student. To the extent that any protestation of innocence is permitted,[15] the institutional practice is

[13] Like Deborah Fox, the testimony of Susan Cooper is controverted by the principal of Marion-Franklin and thus no useful purpose is served by a review of the facts. The same central controlling fact as found in the Deborah Fox story remains: there is a major dispute about the truth, but the student was given no opportunity to contest the suspension. Susan's testimony is to be found at pp. 137-47 of the Appendix; refuting testimony is found at p. 110 *et seq.* of the Appendix. The letter referred to is Plaintiffs' Exhibit 4A and is found at pp. 142 and 224 of the Appendix.

[14] See testimony of John Fulton at pp. 111-14 of the Appendix. See, also the testimony of Norval Goss at pp. 163-71 of the Appendix.

[15] The student is usually sent to the principal or vice-principal to be informed of his suspension. Although this is merely a step in the suspension process and not viewed as a truth ascertaining procedure, sometimes a teacher might be called in if the student convincingly attracts the attention of the principal. This process is strictly *ad hoc*. (Appendix, pp. 111-14 and pp. 167-71).

to grant an irrebuttable presumption of truthfulness to the person opposing the student.[16]

The record then seems clear. No hearing is given either prior or subsequent to a suspension. A suspension frequently develops into a longer term exclusion or transfer. It is also clear under the statute in question that no hearing precedes an expulsion. Further, the named Plaintiffs, in varying degrees, showed manifestations of the harms associated with exclusion from school. (see *infra*, p. 33 *et seq.*). Certainly, as Appellants note, all named Plaintiffs graduated. Yet, even by their own exhibit (Appendix, p. 286), six of the eight students who were in school the previous year finished the 1970-71 school year with fewer credits than the previous year, and two, Dwight Lopez and Carl Smith, lost substantial credits. It is notable that three of the nine named Plaintiffs had permanent entries in their records concerning the suspensions. (Appendix, p. 219, Deborah Fox; Appendix, p. 244, Rudolph Sutton; Appendix, p. 256, Tyrone Washington).

Summary of Argument

A. Under this Court's rulings there can be no dispute that education in Ohio is a protected interest entitled to the safeguards of the Due Process Clause of the Fourteenth Amendment. Several decisions have held education to be a protected "liberty", e.g., *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626 (1923); *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954). Given the existence of Ohio legislation establishing the right to education in that state, e.g., Ohio Revised Code, Sections 3313.48, 3313.64 and 3321.01, there can be no question that education is also a protected "property" interest within the meaning of *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972).

[16] See testimony of John Fulton. (Appendix, p. 113).

B. Suspension from school is state action which stigmatizes a child as a trouble maker and damages his reputation. Such a stigmatization requires Due Process protection. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971).

C. Deprivation of a protected interest or state action causing stigmatization requires some form of appropriate prior hearing, absent an emergency situation. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Wisconsin* v. *Constantineau, supra*; *Board of Regents of State College* v. *Roth, supra*. Even if an emergency exists, Due Process requires a subsequent hearing. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870 (1950).

D. There is a high probability that substantial harm will result whenever a child is excluded, through suspension, from this important interest of receiving an education. The obvious loss through deprivation of education coupled with the substantial probability of collateral consequences meets that quantum of harm required to invoke the Due Process clause. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823 (1969) (Harlan concurring); *Fuentes* v. *Shevin*, 407 U.S. 67, 90, 92 S.Ct. 1983, 1999 (1972); and *Board of Regents of State College* v. *Roth, supra*. Further, as the District Court correctly recognized, the severity of the deprivation merely goes to consideration of the form of the hearing and not to whether the "root requirement" of a prior hearing should or should not be met. *Roth, supra*; *Goldberg, supra*.

E. The Ohio legislation declared unconstitutional by the District Court, which provides that a student may be suspended without any hearing and may be expelled without a prior hearing, violates the above-stated precepts of law. Ohio Revised Code, Section 3313.66 and Section 1010.04 of the Administrative Guide of the Columbus Public Schools.

Argument

The students urge this Court to keep in mind several points while considering the arguments advanced herein. First, this case does not directly involve what form of hearing should be prescribed in the case of a suspension. Under this statute and the Columbus regulations, *no* hearing is given either prior or subsequent to a suspension. Thus, the primary issue is whether the Appellees (hereinafter "students") can be deprived of an education, through suspension, without any hearing. Secondly, although the facts surrounding some of the named Plaintiff students might fit within an "emergency" exception to the prior hearing rule, no subsequent hearing was ever offered or given to them. Surely in an emergency situation when nerves might be on edge, and the chance for mistaken or capricious action is heightened, the need for procedural protections becomes that much greater.

I. Education in Ohio Is a Protected Interest Within the Meaning of the Due Process Clause.

In *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), this Court ruled that one must have a "liberty" interest or a "property" interest in order to invoke Due Process protection. Both reason and this Court's precedents support a holding that education in Ohio satisfies the criterion for each of these interests.

In *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923) this Court, in an often cited passage, defined "liberty" as follows:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included

> things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge*, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. 262 U.S. at 399 (emphasis added).

In *Pierce* v. *Society of Sisters of the Holy Names*, 268 U.S. 510, 45 S.Ct. 571 (1925), this Court reiterated that education is a liberty within the meaning of the Due Process Clause. In *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954), this Court again held that education was a liberty subject to Due Process protection. Moreover, this Court affirmed this important principle only a year ago in *Roth*, when it quoted approvingly the above-stated definition of liberty from *Meyer*. 408 U.S. at 572. Thus this Court has been consistent in following its acknowledgment in *Meyer* that the "liberty" of the Due Process Clause, at the very least, includes the right to education.

The District, in its Brief on The Merits, tortuously attempts to explain away this line of decisions. It argues that the "liberty" of these cases is a liberty to be free of public education; therefore, the argument goes, a deprivation of public education can not be perceived to be the deprivation of a liberty subject to Due Process protections. To carry this argument to its logical conclusion, the District is forced to argue that even an expulsion need not be protected by Due Process since it is mere exclusion from a non-liberty. (Appellants' Brief, p. 7). This argument falls of its own weight. First, this argument runs counter to every case that has decided this issue, including those

cited by the District. The legal dispute in the lower court cases has been whether a short term suspension requires stringent protections, and not, whether education is a protected interest; all courts have either ruled or assumed that it was. See e.g., *General Order on Judicial Standards of Procedure & Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning*, 45 F.R.D. 133 (W.D. Mo. *en banc* 1968).

Second, to argue that the only educational "liberty" protected by the Constitution is the right to seek an education outside the public schools is to make "liberty" a frail gossamer. Financial limitations would prohibit the great majority of citizens from enjoying this notion of educational "liberty." And, indeed, it seems likely that it was recognition of this fact in part that prompted Ohio to provide for the free education of its youth. ORS 3313.48. To limit the educational freedom protected by the Constitution solely to private searches for knowledge is to rob public education of its heretofore vital and prominent role in our society. It undermines and denegrates this Court's consistent view of public education's vital role expressed so fully in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and reiterated recently in *San Antonio Independent School District* v. *Rodriguez*. 411 U.S. 1, 93 S.Ct. 1278 (1973). This suggestion by the defendant District is not only an inaccurate view of the law. It is a dangerous inroad on an important protected interest which has long been granted special constitutional protection by this Court.

The right to education in Ohio must be considered to be a "property," as well as a "liberty," interest, subject to Due Process Protection.[17] In *Board of Regents of State*

[17] The Appellants assert that the District Court "recognized that education is not a property right." (Appellants' Brief, p. 3). This is not an accurate portrayal of the District Court's holding. Although

College v. *Roth*, 408 U.S. 564, 577, this Court ruled that property interests may be derived from statutory entitlements. The Ohio students' right to this vital interest of education is a long and well established entitlement.

A student's right to education in Ohio and the concomitant duty of the state to provide schooling goes back to the origins of that state. The Northwest Ordinance of 1787, which first established a government in that area known today as Ohio, provided in Article Three that "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The Constitution of Ohio of 1802 in Section Twenty-five (25) of the Bill of Rights provided that equal participation of students should be permitted in schools funded by the United States,[18] and that "all doors of the said schools, academies and universities shall be opened for the reception of schools, students and teachers of every accord...."

The Constitution of 1851, Section Seven (7) of the Bill of Rights, declared "religion, morality and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws.... To encourage schools and the means of instruction."

The present Constitution likewise provides that the General Assembly must pass laws to encourage schools and the means of instruction and must provide through taxation for a "thorough and even system of common schools throughout the state of Ohio." (Art. VI, § 2).

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the Court characterized education as a liberty, it noted that statutory entitlements such as education often take on the incidents of property, citing Reich, *The New Property*, 73 Yale L.J. 733 (1964). (see Motion To Affirm, p. 54, n. 16). The District Court further took notice of the Ohio students' statutory right to an education in discussing the liberty interest. (Motion To Affirm, p. 52, n. 14).

[18] Presumably at that early date schools were primarily funded by the United States.

Present legislation, passed pursuant to these constitutional provisions, clearly imposes a duty on local communities to provide for the education of those children residing therein. Section 3313.48 states:

> The board of education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction...

Section 3313.64 states, *inter alia*:

> The schools of each city, exempted village or local school District shall be free to all school residents between six and twenty-one years of age...

Not only is there a duty to provide free schooling for the children of Ohio (and, of course, a concomitant right for them to attend), but, as in most states, children are mandated by law to attend. Section 3321.01 *et seq.* of the Ohio Revised Statutes provides that all children between the ages of six and eighteen years of age must attend school and that certain penalties result from non-attendance. In fact, this requirement is considered of such magnitude that in certain instances a parent may be required to post a bond to insure that his child attends school. ORS 3321.48. The state courts have further held that under the Ohio statutory scheme there is not only the right of a child to attend school, but that if poverty interferes with the ability to exercise that right, the public must assume the burden of overcoming this barrier. *Dornette* v. *Allais*, 76 Ohio App. 345, 363-64, 63 N.E.2d, 805, 813 (1945). See also *State* v. *Gans*, 168 Ohio St. 174, 151 N.E.2d, 709 (1958).

In sum, Section 33 of the Ohio Revised Statutes broadly establishes a state-wide mandated system of education.

The clear and unequivocal purpose of this legislation is to insure that the children of the state have the opportunity to grow and develop into contributing members of society. To that end, the legislation insures their right to an education. It is precisely upon such a statutory entitlement that "property" rights for Due Process purposes have been and should be built. To allow school officials to deprive children of this statutory entitlement without some form of procedural protection is to invite mistaken, capricious or arbitrary action in clear conflict with the concept of entitlement.

In *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), this Court specified how a property interest may be ascertained. This Court stated:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg* v. *Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so. 408 U.S. at 577.

The claim of entitlement by those welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), was surely no stronger than the claim of these students to the right to attend school.

In *Bell* v. *Burson*, 402 U.S. 533, 91 S.Ct. 1586 (1971), this Court ruled that a driver's license could not be revoked without a prior hearing. As this Court stated:

> Relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." 402 U.S. at 559.

Again, the entitlement to a driver's license in Georgia was no greater than the entitlement of these students to education in Ohio; and surely the extensive and historical statutory scheme devised to insure the education of Ohio youth is far stronger than the "understanding" found to constitute the basis of an entitlement in *Perry* v. *Sinderman*. 408 U.S. 593, 599, 92 S.Ct. 2694, 2699 (1972).[19]

The plurality holding in *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513 (1974) is based upon factors which are not present in the instant case. In *Arnett*, the plurality held that where the legislative grant of an establishment is inextricably intertwined with the procedures for denying the entitlement, one cannot take the grant without also accepting the procedures. In *Arnett*, such entitlement resulted from the fact that the entitlement and the procedures were simultaneously conferred in the same sentence. (See discussion, 42 U.S.L.W. 4518). Historically, no entitlement preceded development of the procedures. The facts in the present case are starkly different. As outlined *supra*, p. 14, the right to education in Ohio historically dates to the Northwest Ordinance of 1787, was preserved and strength-

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[19] See also, *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215 (1926) (Right to Practice Law); *Sherbert* v. *Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) (Right to Unemployment Compensation), holding entitlements to be subject to Due Process Protection.

ened by early constitutions, and is encompassed in the present Ohio Constitution. The constitutional right to an education in Ohio is made explicit by the whole legislative scheme found in Section 33 of the Ohio Revised Statutes and particularly by ORS 3313.48, 3313.64, and 3321.01. Section 3313.06 ORS, the Section under attack, stands alone, and does nothing more than prescribe disciplinary procedures. Thus the facts of the instant case are vastly different from those in *Arnett* where the entitlement and the procedures were adopted simultaneously in one sentence.

The statutory right to education in Ohio is thus much better established, both as it presently exists and in its historical antecedents than most of the other entitlements that this Court has designated property interests. In the same sense as welfare is to the welfare recipient, and a driver's license to the driver, education to the Ohio child is "essential(ly) fully deserved and in no sense a form of charity."[20] To allow mistaken, arbitrary or capricious deprivations of education without any form of procedural protection would defy logic.

The Appellants (hereinafter "District") have argued that this Court's ruling in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973), somehow undercuts the assertion that a student's right to education is a protected interest within the meaning of the Due Process Clause. This analysis would contradict this Court's statement in *Rodriguez* that:

> Nothing this Court holds today in any way detracts from our historic dedication to public education. 411 U.S. at 30.

It further ignores the difference between "protected interests" as enunciated in the Due Process cases and

[20] Reich, Individual Rights & Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1964).

"fundamental interests," an equal protection concept. As this Court has made clear, a protected interest may spring from other than a constitutional nexus whereas a "fundamental interest," giving rise to strict equal protection scrutiny, emanates *from* the Constitution. A protected interest receives Due Process protections, when, as is the case of education in Ohio, it is a statutory entitlement, or when as here, reputation and opportunities are limited by state action. This argument of the District also runs counter to several express statements made in the *Roth* and *Rodriguez* decisions.

Previously we discussed this Court's rulings that a property interest may arise from a statutory entitlement. Indeed, in *Board of Regents of State College* v. *Roth, supra*, 408 U.S. 564, 577, this Court stated that:

> Property interests, of course, are not created by the Constitution.

The search for a "fundamental interest," for equal protection purposes is, to the contrary, a search for a constitutional nexus; as this Court stated in *Rodriguez*:

> Thus the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. *Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.* (411 U.S. 1, 33-34) (Emphasis added).

In fact, in *Rodriguez* this Court apparently anticipated and rejected the assertion now being made by the District.

In a discussion of welfare litigation, this Court noted that in *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970), it had rejected the contention that the right to welfare should be treated as "fundamental" for equal protection purposes, while contemporaneously ruling in *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), that the deprivation of welfare was the deprivation of a protected property interest deserving Due Process protections. See discussion in *Rodriguez, supra*, 411 U.S. at 33 n.72. As in the case of welfare, the right to a driver's license is not "fundamental"; yet as the Court acknowledged in *Bell* v. *Burson, supra*, 402 U.S. 535, it is a statutory entitlement subject to Due Process protections. Likewise, education in Ohio is a statutory entitlement and should be accorded, at a minimum, the same protections.

It is, of course, reasonable that a "protected interest" under the Due Process Clause be different from a "fundamental interest" under the equal protection clause. The purposes and orientation of those two clauses are different. On the one hand, procedural due process is designed to protect the individual against arbitrary or mistaken governmental decision-makers; on the other hand the equal protection clause aims to insure that like-situated persons receive similar treatment.

Different as the orientation is between the two clauses, the purpose served by the "fundamental interest" designation is unique to the equal protection clause. That purpose is to provide a framework for measuring the degree of justification the state must give when it treats groups or individuals differently. If a "fundamental" or constitutionally-based interest is involved, the state has a higher burden of justification than if a non-fundamental interest is involved.

This whole framework and its reason for existence has no applicability to the measurement of, or need for, procedural safeguards under the Due Process Clause.

II. A School Suspension Is Stigmatizing and Results in a Loss of Reputation: as Such, It Requires Due Process Protection.

In *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971), this Court stated:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him notice and an opportunity to be heard are essential.

This statement in *Constantineau* was a reiteration of principles enunciated in *Weiman* v. *Updegraff*, 344 U.S. 183, 191, 73 S. Ct. 215, 218-219 (1952), and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168, 71 S. Ct. 624, 646 (1951) (Frankfurter, J. concurring).

Although explicit psychological testimony is not required to establish that a suspension officially stamps a child as a "trouble maker," several prominent psychologists did testify at the trial to confirm that the stigma is this, and may be much more. Dr. Herbert Rie, the Chairman of the Section on Child Development and Psychology, Childrens' Hospital, Columbus, Ohio and Professor in the Department of Pediatrics & Psychology at Ohio State University, testified that this labeling by teachers had the potential of serious educational consequences and could also adversely affect the child's dealings with his family, neighbors and peers.[21] Indeed, this seems so basic that one would expect it to have served as the judicial basis in other Due Process exclusion cases, and it has. In what is probably the leading case in the area of school exclusion, *Dixon* v. *Alabama State Board of Edu-*

[21] Appendix, pp. 171-82. See also, the testimony of Dr. Robert Woody on this point, Appendix, pp. 154-162.

cation, 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961), the basis for providing Due Process protections to an excluded student was the recognition of the stigma that was likely to attach to the student. See also, *Vought* v. *Van Buren Public Schools*, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969); *Cf. Breen* v. *Kahl*, 296 F. Supp. 702, 707 (W.D. Wisc. 1969), aff'd, 419 F.2d 1034 (7th Cir. 1969).

In the preparation for this brief, Counsel for the students surveyed other more concrete forms of harm that result from a suspension. Although detailed discussion of the findings will be deferred to that section dealing with harm and its application to this case,[22] we note that a substantial probability exists that a suspension of a high school student may limit both college and employment opportunities. This is further substantiated by the testimony of Floyd Horton, a former Counselor in the Columbus Public School and presently a Doctoral candidate in the School of Educational Administration at Ohio State University.[23]

In sum the designation of a student as "suspended" by definition is a negative label which has the substantial potential of causing serious harm. It is the sort of stigma that should receive some prior procedural protection under the rule of *Constantineau*.

III. Due Process Requires a Prior Hearing Whenever a Protected Interest Is Invaded or a Stigma Imposed — Absent Extraordinary Circumstances.

There is probably no principle more firmly embeded in the law than the requirement that the invasion of a protected interest be preceded by some form of Due Process

[22] *Infra*, p. 29.
[23] Appendix, pp. 182-88.

protection. Under the state legislation herein attacked neither a prior nor subsequent hearing is accorded a suspended student, and only a subsequent hearing is accorded an expelled student. Clearly this treatment runs afoul of the principle.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950), this Court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require the deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820 (1969), this Court ruled that a wage garnishment must be preceded by some form of adequate procedural protection. In *Sniadach*, unlike the present case, there was at least the opportunity for a subsequent hearing.

In *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970), this Court ruled that the termination of welfare benefits must be preceded by Due Process protections. It is notable that the protections that were offered, but found to be inadequate in *Goldberg*, were extensive compared to the nonexistent protections offered to a student in Ohio. In *Goldberg*, the welfare recipient was entitled to seven (7) days written notice of the intent to discontinue benefits, the right to a personal meeting with a case worker prior to the discontinuance, the right to file a written statement with a supervisor, and the right to a post termination hearing. The suspended student in Ohio has *no* protection.

In *Boddie* v. *Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780, 786 (1971), this Court stated:

> That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. (Footnote omitted)

In *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591 (1971), this Court ruled that a hearing must precede the deprivation of a driver's license; this was despite the fact that procedures were in existence which were more protective than here. In *Bell* there was a prior hearing to determine whether the person whose license was to be revoked was properly identified. There is not even this minimal protection for the Ohio student.[24]

In several recent cases this Court has explicitly reaffirmed the principle that Due Process requires some form of a hearing prior to the deprivation of a protected interest. In *Fuentes* v. *Shevin*, 407 U.S. 67, 82, 92 S. Ct. 1983, 1995 (1972), this Court stated:

[24] Although the concurring opinion by Justices Powell and Blackmun in *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513 (1974), denies the right of a full scale trial-type hearing prior to the dismissal of a civil service employee, it is notable that the employee had extensive pre-dismissal and post-dismissal rights in comparison to the students in the present case. Those rights included: (a) written notice of charges, (b) access to materials upon which charges are based, (c) the right to respond orally and in writing to the charges, and (d) the right to present affidavits. All of the above-listed rights accrued before dismissal. After dismissal the employee had the right to a full scale evidentiary hearing. The student in Ohio has absolutely no rights under 3313.66 ORS.

> The Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes place. (emphasis added)

Finally, in *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2705 (1972), this Court stated:

> When protected interests are implicated the right to some kind of prior hearing is paramount.

This Court has recognized a limited exception to the above-stated rule whenever emergency circumstances exist.[25] The District Court recognized that if a narrowly defined emergency did exist prior procedures need not be utilized, but that a subsequent hearing must be held.[26] This is a reasonable approach; but, of course, the statute under attack is not limited to emergencies.

This Court's development of the prior hearing principle is obviously predicated upon a recognition that once the deprivation has taken place it is virtually impossible to make the person whole by a subsequent proceeding. As stated in *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965):

[25] See, e.g., *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 41 S.Ct. 214 (1921); *Phillips* v. *Commissioner of IRS*, 283 U.S. 589, 51 S.Ct. 608 (1931); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870 (1950).

[26] Appellees Motion To Affirm pp. 60-61. Indeed, the need for a hearing is increased when resort is to an emergency suspension; as Justice Frankfurter stated in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171 "[The opportunity to be heard] should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe" (Frankfurter, concurring).

> A fundamental requirement of due process is the "opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

As in the cases enunciating this Due Process principle, irreparable loss will be suffered through a suspension that cannot be completely remedied by a subsequent adjudication of innocence.[27] As the chief witness for the District, Norval Goss, conceded:

> Any absence from school can, of course, have negative effects and that would include suspension from school.[28]

It is not reasonably to be expected that a teacher will be fully able, or even likely motivated, to compensate for the time missed from school;[29] a day lost is a day lost no matter how one views it.

Further, although some mitigation of the psychological harms inherent in an unjust suspension might be expected from a subsequent hearing, it is not possible for the child to be made whole. For a child to be declared innocent of wrongdoing after having been irreparably excluded from school for a period of time would inevitably appear to be administrative double-talk. The potential psychological fall-out would seem to be far from speculative.

No reason, either administrative or substantive, thus exists why the "root requirement" of a prior hearing, denied by the Ohio Statute, should be dispensed with when

[27] It should, of course, be remembered that there is no provision for even a subsequent hearing in the case of a suspension under the Ohio legislation.

[28] Appendix, pp. 165-66.

[29] See, e.g., testimony of Floyd Horton, Appendix, p. 184.

a child is suspended from school — absent a narrowly defined emergency.

The basic purpose underlying the Due Process Clause is to avoid arbitrary, capricious, mistaken or authoritarian infringements of significant interests such as education. Recent studies and decisions show that just such infringements do take place in the educational sphere. In fact a major study recently published concludes that:

> There are strong indications, however, that suspension and expulsion have been used as weapons of discrimination, especially in resisting increased desegregation and in some instances during protests for more general students' rights.[30]

[30] The Student Pushout, Victim of Continued Resistance to Desegregation, published by the Southern Regional Council and the Robert F. Kennedy Memorial, 1973, p. VIII (hereinafter Study). The statistics supporting this conclusion show a startling disproportion of minorities being suspended and/or expelled. In Little Rock, Ark. in 1971-72 blacks comprised 33.4% of the high school students. 79.9% of the students suspended were black. (p. 2 Study). Although the Richland County, South Carolina (Columbia) District was almost evenly split between blacks and whites in the first half of the 1972-73 school year 1,519 blacks were suspended while only 445 whites were similarly treated (77% black, 23% white) (pp. 3 & 4 Study). In Dallas, Texas a review of HEW 101 Forms showed that 9.1% of the blacks; 6.4% Chicanos and 4.9% of the whites were expelled in 1971-72. (Study, p. 4). In fact an analysis by the Office of Civil Rights of HEW of these forms nation-wide concluded that "the expulsion rate for minority students was twice that for non-minority students, and the expulsion rate for black students was three times that for non-minority students." (Study, p. 5). Indications are that this is not merely a Southern Desegregation Phenomenon. In Omaha, Neb. in 1970-71, 8% of the minority children were expelled from school while only 2.1% of the non-minority children were expelled (Study, p. 6). Other studies have noted the same disproportions. In 11 Integrated Education, 30 "Race and Suspension in New Orleans" it was reported that 15.3% of the black population was suspended in 1971-72 while 8.8% of the white population was suspended. See also the Report of the Select Committee on Equal Educational Opportunity, United States Senate, "Toward Equal Educational Opportunity." (Dec. 31, 1972) at p. 140.

A recent decision by the Commissioner of Education of New York State acknowledged that handicapped children were being improperly suspended from the schools of New York City. *In The Matter of The Appeal of Reid et al.*, No. 8742, New York State Education Department, filed Nov. 26, 1973.

A brief review of some of the leading suspension-expulsion cases shows a clear pattern of the misuse of these sanctions to stiffle First Amendment Rights. In fact, this Court's decision in *Tinker* v. *Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969), arose from a suspension, and the decision in *Papish* v. *Board of Education*, 410 U.S. 667, 93 S. Ct. 1197 (1973) emanated from an expulsion. See also, *Quarterman* v. *Byrd*, 453 F.2d 54 (4th Cir. 1971); *Shanley* v. *Northeast Ind. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972); *Scoville* v. *Bd. of Ed.*, 425 F.2d 10 (7th Cir. 1970), and *Hatter* v. *Los Angeles City High School Dist.*, 452 F.2d 673 (9th Cir. 1971).[31]

In sum, school officials are not immune from the same human vices or foibles that have given rise to a recognition of the need for Due Process protection in other areas. They can and do make mistakes, they can and do act arbitrarily or discriminatorily. Students should not be deprived of an education without at least being afforded

[31] Professor Charles Allan Wright, in discussing the need for procedural protections for the disciplined student observes that, "without procedural safeguards the substantive protection would be virtually useless. There would be no point in an elaborate doctrine that students may be disciplined for disruptive action but not for mere expression if some administrators were permitted to make an *ex parte* and unreviewable determination that particular behavior was 'disruptive action' and that a particular student had participated in it! In a system of ordered liberty, therefore, it is essential that substantive rules we applied through fair and reliable procedures." Wright, "The Constitution on Campus," 22 Vand. L.R. 1027, 1059-60 (1969),

some degree of procedural protection.[32] It is educationally counter-productive to permit arbitrary action without constitutional protections. As this Court stated in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 637, 63 S. Ct. 1178, 1185 (1943):

> The Fourteenth Amendment as applied to the States, protects the citizen against the State itself and all its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

To permit suspensions without providing constitutional protections against arbitrariness surely teaches youth to discount important principles of our government as mere platitudes.

IV. The District Court Correctly Ruled That "The Magnitude of the Deprivation Affects the Formality and Comprehensiveness of the Due Process Safeguards; It Does Not Affect the Basic Fact That These Safeguards Shield the Student From Arbitrary or Capricious Interference With His Right to Education."[33]

[32] It is true, as Appellants note, that no evidence was before the lower court concerning racial discrimination or First Amendment infringements. Yet the clear evidence of misuse of suspension procedures points up the need for procedural protections in general; and, of course, there was evidence before the lower court of arbitrary, mistaken suspensions.

[33] Appellees' Motion To Affirm, p. 55.

This Court has forcefully and consistently held that the extent of deprivation of a protected interest does not affect the root requirement of some form of prior hearing; absent a finding of *de minimis* harm, not applicable in a school suspension setting, the element of harm is properly considered only in determining the formality of the procedures required.

In *Boddie* v. *Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780, 786 (1971), this Court stated:

> The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interests, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. (footnote omitted)

In *Fuentes* v. *Shevin*, 407 U.S. 67, 85-86, 92 S. Ct. 1983, 1997 (1972), this Court, in an observation that has special poignancy in the immediate case stated:

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. *While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not*

> *decisive of the basic right to a prior hearing of some kind.* (emphasis added)

Finally in *Roth, supra*, this Court stated:

> . . . and a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. 408 U.S. at 570.

In a footnote to this quote, this Court made clear just when the weighing process takes effect. This Court stated:

> The Constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest of course, does not depend upon such a narrow balancing process. 408 U.S. at 570, n. 8.

The District has cited several cases which hold that when 'grievous loss' is suffered Due Process protections must apply.[34] This does not contradict the above statements. If 'grievous loss' means great loss then surely it is encompassed within the ambit of these cases. The District however argues that at a minimum great loss (grievous loss) must be suffered before Due Process protections apply. This interpretation contradicts the above holdings and ignores several other recent statements indicating what the correct threshold of injury should be.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342, 89 S. Ct. 1820, 1823 (1969), Mr. Justice Harlan stated that any deprivation that could not be characterized as "*de minimis*" must be preceded by a hearing. This concurring view was adopted and reiterated by the majority

[34] *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

in *Fuentes* v. *Shevin, supra,* 407 U.S. at 90, n. 21, where it was stated:

> The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. See, e.g., *Boddie* v. *Connecticut,* 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 and cases cited therein. But *some* form of notice and hearing — formal or informal — is required before deprivation of a property interest that "cannot be characterized as de minimis." *Sniadach* v. *Family Finance Corp., supra,* 395 U.S., at 342, 89 S. Ct. at 1823 (Harlan, J. Concurring).

The approach suggested by the School District would throw the entire law of Due Process into chaos, result in increased litigation and burden governmental officials with an impossible task of determining when process is due. It would appear to be a virtually impossible mental task to determine whether an interest is so important, and an invasion so serious, as to require a prior hearing when those exact same elements must be weighed in determining the form of the hearing. It is submitted that the present flexibiity as to form creates a degree of uncertainty for both government officials and those affected by governmental activity that would become an impossible quagmire if it were carried over into the basic question of whether any hearing is required. This Court's previously-cited decisions wisely avoid this result.

There can be little question that the deprivation of education for even a short time, creates more than *de minimis* harm. When one considers the certain harm from loss of schooling and the substantial likelihood of collateral consequences it becomes manifestly irrational to argue against the need for procedural protections.

The direct, immediate, and certain effect of a suspension is that the child is excluded from education for a period of time. For the marginal child who is most likely to be affected by a mistaken or arbitrary suspension, several days of missed schooling might well defeat any chance he has of keeping up with the class; even for other children, the exclusion from school is unlikely to be compensated. Not surprisingly, the record discloses that overworked teachers are unlikely to take the time to help the student overcome his absence;[35] even if such efforts were made, the important give and take of classroom discussion is certain to be lost.[36] The chief witness for the District conceded the possibility of educational harm.[37] In terms of grades, the standard practice in Columbus, as in many districts, is to give zeros for all work missed.[38]

The potential psychological harm was well documented at the trial. The District Court summarized the unrefuted testimony of two prominent Ohio Psychologists as follows:

> The effects of suspension are not uniform. Most suspended students respond in one or more of the following ways:
>
> 1. The suspension is a blow to the student's self-esteem.
> 2. The student feels powerless and helpless.
> 3. The student views school authorities and teachers with resentment, suspicion and fear.

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[35] See testimony of Floyd Horton, Appendix, p. 184.

[36] See *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637, 641 (1950); and *Brown* v. *Board of Education,* 347 U.S. 483 (1954), recognizing the immeasurable importance of classroom discussion and interchange.

[37] See testimony of Norval Goss, Appendix, pp. 165-66.

[38] Appendix, pp. 164-65.

4. The student learns withdrawal as a mode of problem solving.
5. The student has little perception of the reasons for the suspension. He does not know what offending acts he committed.
6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a trouble maker in the future.

A student's suspension may also result in his family and neighbors branding him a trouble maker. Ultimately repeated suspension may result in academic failure.[39]

A school suspension, regardless of length, can also have negative consequences on college admissions and upon future employment opportunities. A survey taken by the Students' Counsel in the preparation of this brief revealed that four (4) of twelve (12) randomly chosen Ohio Colleges ask expressly on undergraduate application forms whether the applicant has ever been suspended from school.[40] In addition, virtually all colleges asked for tran-

[39] Appellees' Motion To Affirm, p. 40. See testimony of Dr. Robert Woody, Appendix, p. 154 *et seq.* and Dr. Herbert Rie, Appendix, p. 171 *et seq.* See also, a sampling of the literature in support of these theses; Flowers, C.E., "Effects of An Arbitrary Accelerated Group Placement on The Tested Academic Achievement of Educationally Disadvantaged Students." Unpublished Doctoral Dissertation, Teachers College, Columbia Univ., 1966; Masling, J., "Differential Indoctrination of Examiners and Rorschach Responses," 29 *Journal of Consulting Psychology*, 198-201 (1965); Merton, R.K., "The Self-Fulfilling Prophecy," 8 *Antioch Review* 193-210 (1948); Rosenthal, R., *Experimenter Effects In Behavioral Research* (New York: 1966); Rosenthal, R. and Lenore Jacobson, "Teachers' Expectancies: Determinates of Pupils' I.Q. Gains," 19 *Psychological Reports* 115-118 (1966).

[40] The application forms for the following schools were received. A "yes" indicates that they expressly ask information about High School suspensions. A "no" indicates that nothing is expressly asked: Antioch—yes; Bowling Green Univ.—no; Case Western—yes; Univ. of Cincinnati—no; Cleveland State—no; Hiram—no;

scripts and asked for school officials to evaluate the student's character and fitness. A suspension might well appear on a transcript or be relied upon by the school official making such an evaluation.[41] Furthermore, the record indicates that students suspended at certain times of the year may irremediably miss certain tests, contests or conferences which have a bearing on college admissions and/or the possible receipt of financial aid.[42] A suspension thus has the substantial probability of causing negative consequences for the college applicant.

The student who decides to seek employment after high school may also suffer harm from an unjust suspension. A review of the basic form book for personnel officers indicates that high school reference checks often ask about the disciplinary problems of the applicant while he was a student.[43] A school official working from a record might well report improper suspensions and thus limit the possibility of employment for the student.

Several other potential consequences that may flow from a suspension have been noted by various studies. One study has observed that:

> While hard data is very rare, a substantial cause and effect relationship does appear to exist between students who are suspended or expelled, on the one hand,

Oberlin—no; Kent State—yes; Ohio State—no; Otterbein—no; Ohio Wesleyan—yes; Ohio Univ.—asked about College dismissal; The one non-Ohio school surveyed, Harvard College, expressly asks the applicant if he has been suspended.

[41] One example of how a suspension may continue to haunt a student, irrespective of its propriety, is shown by the student records of three of the nine named Plaintiffs. Their records have express notations indicating the existence of the suspensions. See Appendix, at pp. 219, 244 and 256.

[42] Testimony of Floyd Horton, Appendix, pp. 182-88.

[43] Marting, AMA Book of Employment Forms, American Management Assn., 1967. See especially p. 423 *et seq.*

and students who become labeled as dropouts on the other. This is an area in urgent need of extensive in-depth research.[44]

Others have noted that students not attending school have an increased likelihood of police contact. A summary of the results of a Public Hearing in Illinois, at which twenty-six child service professionals testified, concluded that:

> Those testifying based their remarks on their experience and observation, consequently there are many different and divergent opinions noted throughout the testimony.
> It was made clear however, the juveniles out of school as the result of truancy, expulsion or suspension have police contact for any number of offenses.[45]

The Student-Appellees do not contend that every one of the potential harms listed-above will happen to every suspended student. In fact, only the educational loss is certain to happen. There is however a substantial probability that any one or combination of these harms may result from a suspension.[46] Not one of these harms, especially the educational, can be characterized as *de minimis*.

[44] "The Student Pushout: Victim of Continued Resistance to Desegregation," Published by the Southern Regional Council and the Robert F. Kennedy Memorial, 1973.

[45] Remarks and excerpts from Public Hearings on Truancy & Expulsion, Educational Service Region, Cook County, Chicago, Illinois. Dec. 13 and 14, 1972, published in ERIC ED 078926.

[46] It is notable that the "harms" envisioned flowing from a garnishment, *Sniadach*, *supra*, 395 U.S. 337 (1969), welfare cutoff, *Goldberg*, *supra*, 397 U.S. 254 (1970), or driver's license revocation, *Bell*, *supra*, 402 U.S. 535 (1971), were not certain to follow. Certainly not every employee had his back driven to the wall by a garnishment or was in dire straits as a result of a welfare cut-off or license revocation. In fact, it seems more certain that a suspension will cause some harm than those acts.

Various lower courts have noted the existence of these harms. In *Hatter* v. *Los Angeles City High School District*, 452 F.2d 673, 674 (9th Cir. 1971), the Ninth Circuit noted that evidence of disciplinary action in a student's records may "threaten prejudice with respect to college admissions and future employment." The court in *Sullivan* v. *Houston Indep. School Dist.*, 307 F. Supp. 1328, 1338 (S.D. Tex. 1969), noted that "collateral consequences" may flow from a suspension.

In *Vail* v. *Board of Education of Portsmouth School District*, 354 F. Supp. 592, 603, n. 4 (D.N.H. 1973), the Court found that, in addition to the immediate educational consequences:

> . . . the record of the suspension may jeopardize a student's future employment and educational opportunities as guidance counselors prepare student recommendations after having examined the student's permanent record file which contains the notice of suspension.

In *Shanley* v. *Northeast Ind. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 967, n. 4 (5th Cir. 1972), the Court, while abjuring a formula for determining whether a harm is major or minor, found that:

> . . . a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final examination that provided for no "make-up." We are convinced here that the three-day suspensions issued to these five high school seniors, who were in the process of applying to and inter-

viewing for college admission and for scholarships, constitute a justiciable penalty under any "major/minor" dichotomy.

See also *Breen* v. *Kahl*, 296 F. Supp. 702, 707 (W.D. Wisc. 1969), *aff'd*, 419 F.2d 1034 (7th Cir. 1969).

Harm, far exceeding *de minimis*, is thus substantially certain to flow from a suspension, irrespective of length. The degree of harm and the certainty of harm undoubtedly increases substantially if the suspension is viewed as arbitrary, capricious or mistaken. Some form of prior procedural protection is manifestly necessary to avoid or mitigate these harms.

V. The Lower Court Cases Starkly Show the Need for a Prior Hearing Rule.

The lower court decisions, insofar as they provide guidance for this Court, present an irrefutable argument for a prior hearing rule. These cases, by their very inconclusiveness and judicial arbitrariness show the unworkability of a conceptual framework that attempts to measure harm and to place such measurement into a formula for determining whether a prior hearing is required. The decision by the lower court in the present case in its reliance upon this Court's precedents presents a stark contrast to the judicial uncertainty found in many other decisions.

Most lower court cases until recently have attempted to measure harm by the length of time out of school. While harm unquestionably increases as the exclusion grows longer, the evidence before the District Court in this case, and the other indicia of harm presented, *supra*, are clear proof that harm is not purely or even mainly a function of time. An unjust one day suspension under

certain circumstances can be devastating. Further, as the cases show, the equating of time with harm results in a purely subjective and arbitrary determination.

The recent law of the Fifth Circuit, the Circuit which has heard more suspension cases than any other, points up this problem. In *Black Students of N. Ft. Meyers Jr.-Sr. High School* v. *Williams*, 335 F. Supp. 820, *aff'd per curiam*, 470 F.2d 957 (5th Cir. 1972), the Court held that a suspension of ten days was a suspension for "a substantial period of time" and thus was in violation of the Due Process Clause if not preceded by a hearing. In *Murray* v. *West Baton Rouge Parish School Board*, 472 F.2d 438 (5th Cir. 1973), the Court ruled that suspensions that were for not "more than a few days," 472 F.2d at 443, need not be preceded by a hearing. In *Shanley* v. *Northeast Ind. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 967 n. 4 (5th Cir. 1972), as previously noted *supra*, the Court ruled that a three-day suspension under the facts of the case was of such a magnitude that it constituted a "Justiciable Penalty." The dilemma is manifest. It is a subjective and necessarily arbitrary judicial determination to say that after a given number of days, such harm gives rise to the need for a prior hearing. It is unworkable to have a determination made on a case by case basis. Further, the length of the suspension is only one ingredient in determining harm. It is submitted that only a prior hearing rule makes sense and avoids this dilemma.

The pattern discerned in the Fifth Circuit is a pattern that can be traced nationwide. In the District of Columbia, for example, a student may not be suspended for more than two (2) days without being given a rather extensive hearing, *Mills* v. *Board of Educ. of District of Columbia*, 348 F. Supp. 866, 878 (D.D.C. 1972), while a decision in the Tenth Circuit, *Hernandez* v. *School Dist.*

No. One, Denver, Colo., 315 F. Supp. 289 (D. Colo. 1970), rules that a statute which permits suspension for up to twenty-five days without any hearing does not violate Due Process.

Compared with this subjective ill-conceived search for a necessarily arbitrary number of days, the District Court's holding in the present case presents a stark, reasoned contrast. The Court below stated:

> It is important to remember that even though the interference with the liberty of a right to education is limited, the student's right to be treated with procedural fairness prior to a deprivation of the right to an education is not lost. The magnitude of the deprivation affects the formality and comprehensiveness of the due process safeguards; it does not affect the basic fact that these safeguards shield the student from arbitrary or capricious interference with his right to education.[47]

Several recent decisions are in substantial accord with the ruling in this case. In *Vail* v. *Board of Education of Portsmouth School District*, 354 F. Supp. 592, 603 (D. N.H. 1973), the Court ruled that prior to any suspension an "informal administrative consultation" must be held. In *Pervis* v. *La Marque Independent School District*, 466 F.2d 1054, 1058 (5th Cir. 1972), the Court stated that:

> When the punishment to be imposed is minimal, *full* compliance with the requisites outlined in *Dixon* is not required. See note 3, *supra*. Moreover it may be that a student can be sent home without a hearing for a short period of time if the school is in the throes of violent upheaval. But even in such a case, a hearing

[47] Appellees' Motion To Affirm, p. 55.

> would have to be afforded at the earliest opportunity. Cf. *Dunn* v. *Tyler Independent School Dist.*, 5 Cir., 1972, 460 F.2d 137. (emphasis added)

In sum, the lesson to be learned from most of the lower court decisions is that any attempt to inject the question of harm into the question of whether any prior hearing should be given as opposed to the determination of the form of a hearing is doomed to result in an impossibly subjective determination. This points up the reasonableness of retaining this Court's long standing prior hearing rule. Several of the more recent decisions, in addition to that of the instant case, support this proposition.

VI. A Statute Which Permits a Deprivation of a Protected Interest Without Also Prescribing Constitutional Procedures Is Facially Invalid.

This Court has long held that a statute which permits the deprivation of a protected interest without also prescribing adequate Due Process protection is facially invalid. Ohio Revised Statute 3313.66, by providing for a deprivation of education without providing procedural safeguards for the student is thus invalid on its face.

In *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625 (1915), a Florida statute permitted a judgment creditor to execute on the property of a stockholder of a corporation which had no assets. The statute did not specifically prescribe constitutionally adequate procedural protections for the stockholder. This Court held that this lack of specificity voided the statute. Although recognizing that in given cases, and indeed in the case before it, the stockholder could receive adequate notice and opportunity to challenge the execution, the Court nevertheless held the statute violated Due Process. In so holding, this Court quoted from several earlier decisions requiring adequate

procedures to be spelled out in the statute permitting the deprivation. See especially the discussion at 237 U.S. 629.

This same principle was recently implicitly recognized in *Wisconsin* v. *Constantineau, supra,* 400 U.S. 433 (1971), where this Court struck down, as facially invalid, a statute permitting an invasion of the liberty of reputation without also prescribing adequate procedures.

Likewise in *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972), the Florida and Pennsylvania replevin statutes were held to be facially defective for they permitted an invasion of a protected property interest without prescribing adequate procedures.

Thus, given the protected nature of education in Ohio, and the deprivation thereof permitted by ORS 3313.66 it is manifest that the Section is facially invalid for failing to prescribe constitutionally sufficient protections.

Conclusion

Both reason and this Court's ample precedents require a holding that a school suspension without any form of notice or hearing violates the Due Process Clause of the Fourteenth Amendment.

Under express holdings of this Court, and under the rationale used to support those holdings, education in Ohio must be considered to be a protected interest. Further, common sense and the evidence in the record lead inexorably to the conclusion that a suspension creates the sort of stigma that should be protected against.

This Court has invariably required that a hearing of some form must precede the deprivation of a protected interest or the imposition of a stigma. No reason exists for a variation from this requirement.[48] We would only note that it is not the deprivation of a minor interest

[48] The issue here, of course, is whether a student can be suspended without any hearing. If the Court feels compelled to discuss the form of the hearing, we would suggest that once school officials have been given the latitude to address the "extraordinary situation" i.e., emergency, no reason exists in fact to deny a student, not within the ambit of the extraordinary situation, the benefit of real, meaningful procedural safeguards. Moreover, as the lower court noted, the student summarily suspended pursuant to an extraordinary situation should promptly be given a subsequent hearing.

that is herein involved but rather an interest so important that this Court has observed that:

> In these days, it is doubtful that any child may reasonably be expected to succeed life if he is denied the opportunity of an education. *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954).

A school suspension, even of short duration, has the potential of seriously jeopardizing this opportunity.

It is notable that virtually all of the major national educational associations endorse the concept of fundamental protection for the disciplined student. The National Education Association has resolved that:

> Procedures may vary in formality with the gravity of the offenses or of the sanction to which an accused person is liable. In no case may the student's rights be abridged or denied, and in no case may the same person act as both judge and prosecutor.[49]

The Joint Statement on Rights and Freedoms of Students[50] notes that while "practices in disciplinary cases may vary in formality with the gravity of the offense and the sanctions which may be applied," nevertheless,

[49] NEA Resolution 60-12, Published in the "Code of Student Rights and Responsibilities," NEA, Washington, D.C., 1971 at p. 29.

[50] Subscribed to by the Association of American Colleges, the American Association of University Professors, the National Student Association, the National Association of Student Personnel Administrators, the National Association of Women Deans and Counselors, and the American Association of Higher Education.

> In all situations procedural fair play requires that the student be informed of the nature of the charges against him, that he be given a fair opportunity to refute them, that the institution not be arbitrary in its action and there be a provision for appeal of the decision.[51]

The American Association of School Administrators recently resolved that suspensions and expulsions should not be utilized unless the "health and safety of other students or personnel in all schools is jeopardized."[52]

In sum, this Court's precedents and good sense require that procedural protections precede exclusion from school. Such protection is minimally necessary to prevent the arbitrary, mistaken or capricious deprivation of the all-important right to education. Affirmance of the District Court's decision would achieve this goal.

Respectfully submitted,

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[51] Found in 53 American Assn. of University Professors Bulletin 365, 368 (1967).

[52] Vol. 7, No. 40 Education Daily at p. 5 (Feb. 27, 1974).